

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
:
v. : No. 4:CR-96-239
:
DAVID PAUL HAMMER, : (Judge Muir)

ORDER:

June 4, 2004

FILED
WILLIAMSPORT

JUN 04 2004

Per CRK
DEPUTY CLERK

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On November 4, 1998, this court sentenced David Paul Hammer to die by lethal injection for the first degree murder of Andrew Marti. The relevant history of this case since the imposition of the sentence of death is set forth in prior orders and we will not repeat that history other than as needed to address the pending matter.

On December 1, 2003, Hammer filed a motion to withdraw his § 2255 motion. By order of January 16, 2004, the motion was deemed withdrawn. An appeal was filed and on June 3, 2004, the Court of Appeals remanded the case to us for further proceedings. The purpose of this order is to schedule a hearing in accordance with the Court of Appeals' remand order.

We will also appoint the Federal Public Defender to represent Hammer. Based on the recommendation of the Federal Public Defender we appointed attorneys Foster and Long-Sharp to represent Hammer with respect to the § 2255 motion. We have reviewed the statutory provisions dealing with the appointment of counsel in capital post-conviction proceedings. From our review we conclude that the appointment of those two attorneys was in violation of 21 U.S.C. § 848(q)(5).

21 U.S.C. § 848(q)(4)(B) relates to the appointment of counsel in proceedings under § 2255 to vacate or set aside a sentence of death. That provision provides that a defendant facing a death sentence is entitled to the "appointment of one or more attorneys in accordance with" 21 U.S.C. § 848(q)(5) and (6).

Section 848(q)(5) states as follows:

If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

Section 848(q)(6) states as follows:

If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

Section 848(q)(5) deals with the appointment of counsel to represent a defendant at a hearing on a § 2255 motion in the district court. The "before judgment" in that provision means the "judgment" or decision in the § 2255 proceeding. This interpretation is consistent with the next provision dealing with appointment "after judgment" of an attorney to represent the defendant in the Court of Appeals.

Neither attorneys Foster nor Long-Sharp is licensed to practice law in the state of Pennsylvania. Moreover, neither of them has the requisite "three years experience in the actual trial of felony prosecutions in" this court. In light of the statutory provisions, we will not reappoint attorneys Foster and Long-Sharp

to represent Hammer.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Federal Public Defender is appointed to represent Hammer with respect to the § 2255 motion. See 21 U.S.C. § 848(q)(5). The Federal Public Defender may designate an attorney in his office or on the Criminal Justice Act Panel to represent Hammer with respect to the § 2255 motion.

2. Within 45 days of the date hereof, the Federal Public Defender shall secure an additional attorney who is experienced in capital cases whose principal office is in the state of Pennsylvania to assist him, or the counsel he designates, in prosecuting Hammer's § 2255 motion.

3. A hearing to determine whether Hammer desires to proceed with his § 2255 motion will be held on October 6, 2004, at 10:00 a.m. If defense counsel desire to proceed with that hearing at an earlier date, counsel shall move for an acceleration of the hearing. If Government counsel concurs in the motion, we will hear the matter at the next opening in our trial calendar acceptable to all counsel.


4. If Hammer desires to proceed with his § 2255 motion, a hearing on Hammer's § 2255 motion will commence on November 8, 2004, at 10:00 a.m., and absent exigent circumstances will continue on each consecutive day thereafter, excluding weekends, until the hearing is concluded.

5. During the pendency of these proceedings, Hammer shall be housed in a correctional facility in the Middle District

of Pennsylvania within a 60 mile radius of Williamsport.

6. Within 30 days the United States Marshal shall transport Hammer to a correctional facility as specified in paragraph 5 of this order.

7. Former counsel for Hammer -- attorneys Travis, Ruhnke, Foster, Long-Sharp and Smith -- shall fully cooperate with the Federal Public Defender and shall provide the Federal Public Defender with any and all legal files relating to Hammer's § 2255 motion within 45 days hereof.



MUIR, U.S. District Judge

MM:gs